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in the
Supreme Court
of the
United States

OCTOBER TERM, 1968

CASE No. 1224

J. H. BROCK, as Trustee for The Wingreen Company, The Dania Corporation, and The Lake Worth Corporation,

Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review two judgments below of the United States Court of Appeals for the Fifth Circuit in a single bankruptcy proceeding.

OPINIONS BELOW

The Opinion of the District Court of the Southern District of Florida dated January 30, 1967 is not reported, but appears at R. 1218.

The Opinion of the District Court of the Southern District of Florida dated February 19, 1968 is not reported, but appears in Petitioner's Appendix at page 39.

The Opinion of the District Court of the Southern District of Florida dated August 6, 1968 is not reported, but appears at R. Vol. V, 1,404 and Petitioner's Appendix at page 49.

The Opinions of the Court of Appeals dated December 5, 1968 are reported at 405 F.2d 429 and 405 F.2d 435.

JURISDICTION

Jurisdiction of this Court is invoked under 11 U.S.C. Sec. 47(c) and 28 U.S.C. 1254(1).

The judgments of the court of appeals were made and entered on December 5, 1968. Petitioner's timely petition for rehearing as Appellee below was denied on January 6, 1969. The petition was filed in this Court on April 3, 1969.

QUESTIONS PRESENTED

According to the Petitioner, the petition presents the following questions:

1. Can a United States Court of Appeals, notwithstanding the provisions of the Bankruptcy Act, direct that an appeal from an interim award of fees for a reorganization trustee and his attorney be presented, other than on the original record, and other than summarily?

2. Though it is admitted that the right to be heard granted to a creditor in proceedings in reorganization contains the right to appeal, however, does such right to appeal exist when the order or decree sought to be appealed does not materially, substantially and adversely affect the appellant?

3. This Honorable Court, in the exercise of its supervisory jurisdiction, is called upon to decide questions of a substantial nature which have not been heretofore settled by this Court:

   a) Where an appellant seeks to review an interim award of fees to a reorganization trustee and his attorney, are the proceedings governed by the provisions of the Bankruptcy Act or are they governed by the statutes dealing with interlocutory appeals?

b) Where an Opinion of the United States Court of Appeals contains obvious omission and error, not supported by the record, can this Honorable Court correct the same so that the Opinion is in conformity with the record?

c) Where a trial court did not abuse its discretion, commit clearly erroneous error, make any mistake in the application of ruling law, can a United States Court of Appeals, in its effort to retry the cause, contrary to its jurisdiction, insert a "legal standard" as a justification of its application of extra-judicial jurisdiction?

STATEMENT OF THE CASE

The Petition For Certiorari involves three interim awards of fees to the Trustee in Reorganization and his attorney. On January 25, 1966, The Wingreen Company, The Dania Corporation and The Lake Worth Company, filed three independent voluntary petitions for corporate reorganization in the United States District Court for the Southern District of Florida and the three estates were consolidated on January 25, 1966.

On February 8, 1966 J. H. Brock was appointed Receiver for the three corporations, and on February 11, 1966, Irving M. Wolff was appointed the Receiver's attorney. On May 23, 1966 the Court entered its order approving Debtors' Petition for Reorganization under Chapter X, making a finding of good faith and appointing J. H. Brock as Trustee, and Irving M. Wolff as his attorney.

The Fee Awards

The Opinions of the court of appeals below hold that the interim awards of fees by the District Court to the Trustee and his attorney for three separate periods — September 1, 1966 to December 31, 1966; January 1, — June 30, 1967; June 30, 1967 — June 30, 1968; and May 24, 1966 — June 30, 1968, are excessive and constituted an abuse of discretion. Pursuant to this holding, the cause was remanded with directions to award $25.00 an hour to the Trustee and $50.00 an hour to his lawyer.

The district court fee awards considered by the court of appeals were as follows:

Table of Fees Awarded by the District Court

Date of Order	Brock (hourly rate)		Wolff (hourly rate)	
June 3, 1966*	$12,500	($35.00)	$20,000	($ 62.50)
Sept. 26, 1966	$13,500	($37.00)	$12,500	($ 72.00)
Jan. 30, 1967	$20,000	($50.00)	$25,000	($113.00)
Feb. 18, 1968	$27,500	($45.00)	$35,000	($ 89.50)
Aug. 5, 1968	$35,580		$69,000	
plus prior allowance	$61,000		$72,500	
Total**	$96,580	($40.00)	$141,500	($. 59.00)

A grand total of $270,580.00 in fees was awarded the Petitioner and his attorney for the 29 months from February 8, 1966 through June 30, 1968.

* To J. H. Brock as Receiver and his attorney.

** For the trusteeship period of May 24, 1966 through June 30, 1968.

In this Court, Petitioner has made a lengthy presentation of facts which he believes show that he and his lawyer have done an outstanding job in this case. While Petitioner is no doubt sincere in his belief, the dispute in the case concerns the valuation to be placed upon these services. The Trustee is charged with the duty of administering the assets of an estate as economically as possible. We believe the Trustee is placed in a position of a conflict of interest between himself and the creditors when it comes to the evaluation of his fees and those of his attorney. The court of appeals noted " . . . There is no evidence as to the reasonable value of the services rendered by the Trustee save his own statements . . . "

The court of appeals below states the pertinent facts as follows at 405 F.2d 432:

> "The thrust of the reorganization proceedings is one of virtual liquidation. The Dania Corporation and The Lake Worth Company were holding companies, controlling shares of the capital stock of banks. These corporations have been liquidated and washed out for all practical purposes by the sale of the stocks to liquidate indebtedness, and to dispose of pending litigation. The Wingreen Company is in operation but on a much reduced basis. It is a real estate holding company and its business consisted of acquiring real estate and developing the same by improving the parcels with apartment houses, office buildings and motels. The reorganization proceedings involved in excess of 900 creditors, with some 50 claiming secured status."

* * * * *

"We also know from the record in the case before us and from the records in the subsequent appeals that the liquidation of the debtor corporations is almost complete. As noted, Dania and Lake Worth have been virtually liquidated. The Wingreen Co. formerly owned and/or operated four motels, an office building, a warehouse building, and four apartment buildings. It also owned vacant lands. Most of these properties were heavily encumbered. All have now been liquidated or lost through sale or foreclosure or abandonment except the Ramada Inn at Cocoa Beach, Florida. That property is subject to first, second, third, and fourth mortgages. The first mortgage is to secure a debt due appellant in excess of $1,000,000. The other three mortgages are to secure debts totaling $1,390,000, including interest, as of October 1, 1968. This property was appraised for appellant in 1966 as having a value of $1,500,000. The trustee has obtained an appraisal as of April 1, 1968 of $2,200,000.

According to a report filed by the trustee, the Ramada Inn was operated at a profit of only $50,900.88 during the first nine months of 1968. The same report shows that the trustee has unrestricted cash available of only $96,029.83 as of September 30, 1968.

The record discloses that the claims of unsecured creditors totaled $1,385,713.95 as of January 25, 1966. In discussing a proposed plan of reorganization, the trustee advised the court on

December 30, 1966 that there were no stockholder equities to be dealt with and that " * * * there is little which the unsecured creditors may expect." We have found nothing in the records before us to indicate any change in this prognostication. The trustee hopes to realize something from a tax loss carry forward, subject to a ruling by the Internal Revenue Service. There is some tag end litigation which may produce assets for the debtors but what is realized, if anything, will not greatly exceed the administrative expenses.

It is apparent that the trustee and his counsel have rendered and are rendering valuable and almost daily services in connection with these Chapter X proceedings. These services have involved complex legal and business matters and we in no way disparage them. The fact remains, however, that they have been more than amply compensated for their services under the circumstances of these Chapter X proceedings."

The Opinion below after discussing the facts in detail states that "the District Court has a broad discretion in the award of fees . . . " The court of appeals concluded there had been an abuse of discretion by the district court resulting "from a difference in view as to the applicable legal standard." 405 F.2d 432. The court of appeals (first panel) went on to say in case 25303:

"[6-8] Our difference with the District Court is that we apply an additional factor: The public interest which is inherent in bankruptcy

> matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable in matters of this kind because of the knowledge that they will be fairly compensated. They must not and cannot expect, however, to be over-compensated, for the court must exercise its discretion for the double purpose of fairly treating the trustee and his counsel while at the same time doing equity to the debtor and creditor. . . . " 405 F.2d 432-433

In cases 26479 and 26711, the court of appeals (second panel) concluded:

> "The District Court is directed to reconsider the request for fees for the stated periods . . . Thus it is that the fees for the period May 24, 1966 — June 30, 1968, . . . must be reconsidered. The facts and circumstances of these reorganization proceedings will not warrant the fees in excess of $25.00 per hour for the trustee and $50.00 per hour for counsel for this period." 405 F.2d 435-436.

Standing to Appeal

Petitioner contended below that respondent, being a disinterested secured creditor of the estates, had no standing to appeal the fee awards. On this issue, the court of appeals held:

> " . . . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of

> The Wingreen Company, and its interest lies in the fact that the fees in question may result in the assessment of administrative costs against that property." 405 F.2d at 431.

The Record Below

The original record was filed in the court of appeals below. However, for the convenience of the court of appeals, the parties were directed to file a printed joint appendix. The court of appeals required the petitioner to diminish his designation of the record on appeal. However, the court of appeals provided in its Order of February 29, 1968 that the court of appeals on its own motion or upon the suggestion of the parties could direct the filing of a supplemental record or appendix. The court of appeals granted motions to supplement the record filed by the Petitioner and Respondent. (Petitioner's Appendix pp. 16, 22, 25, 26)

REASONS FOR DENYING THE WRIT

1. Section 250 (11 U.S.C. 650) of the Bankruptcy Act was fully complied with because this case was determined on the original record. The printed joint appendix which was furnished for the convenience of the court of appeals appears to be in accord with the practice of this Court under its Rules 17 and 26, and Rule 30, Federal Rules of Appellate Procedure.

2. The holding below, that a secured creditor has standing to appeal excessive fees awards which "may result in the assessment of administrative costs against that property" (405 F.2d at 431), is clearly correct in

view of Section 206 of the Bankruptcy Act (11 U.S.C. 606) which provides:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor, shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."

The holding below on this issue is also in probable accord with this Court's decisions. In **Young** v. **Higbee,** 324 U.S. 204, 209 this Court said:

> ". . . Potts and Boag appealed under §206 of the Chandler Act, 11 U.S.C.A. 606 which, contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters relating to corporate reorganizations. Courts have liberally construed this language as authorizing appeals . . ."

In any event, the issue is moot because the Court of Appeals found from the record:

> ". . . Massachusetts Mutual is the holder of a first mortgage on one of the properties of The Wingreen Company, and its interest lies in the fact that the fees in question may result in the assessment of administrative costs against that property." 405 F.2d at 431.

3. The Petitioner's contention that the Opinions below stand in direct contravention of the Second, Seventh and Ninth Circuits is not supported by the cases cited. The decision below is not in conflict with any decision of another court of appeals.

Ritchie Inc., v. Chesebrough-Pond's, Inc., 281 F.2d 755 (2CCA 1960) was a trademark infringement case in which the district court sitting without a jury had dismissed the case. The case clearly does not involve Section 206 of the Bankruptcy Act. **In Re Michigan-Ohio Bldg., Corp.,** 117 F.2d 191 (7CCA 1941) involved a case in which the plan of reorganization was "carried to fruition." Two stockholders of the new reorganized company appealed the retention of jurisdiction for two years by the district court. The court of appeals dismissed the appeal on its own motion and the opinion does not even discuss Section 206 of the Bankruptcy Act. **Manda v. Sinclair,** 278 F.2d 629 (5CCA 1960) is an ordinary bankruptcy case that does not even remotely involve Section 206 of the Bankruptcy Act. **Mayer v. National Missile and Electronics, Inc.,** 326 F.2d 401 (9CCA 1964) was a contest between a judgment creditor and mortgagee, an ordinary civil action again not involving Section 206 of the Bankruptcy Act.

Vol. 6A, Collier on Bankruptcy (14th Edition) at Page 310 states:

> ". . . It is universally agreed, however, that Congress intended a more extensive right of appeal in Chapter X cases, and §208, giving the Securities and Exchange Commission under certain conditions the rights of a party in interest but withholding the right to appeal, has been point-

> ed to as indicating legislative awareness that the right to be heard carries with it the right to appeal. This enlarged right created by §206 has not, to date, developed any substantial delays in proceedings or given rise unduly to 'nuisance' appeals, a possibility originally feared in some quarters."

Contrary to Petitioner's contention of direct conflict between Circuits, the Ninth Circuit upheld the creditors right to appeal under Section 206 in the corporate reorganization case of **Gleeson** v. **Carr,** 219 F.2d 64 (9CCA 1955), and listed the opinions of the Ninth Circuit, Third Circuit, Second Circuit, Seventh Circuit and First Circuit which are in harmony with the Opinions in the instant case. The Court said:

> "The right to be heard under this section includes the right to appeal. Rogers v. Consolidated Rock Products Co., 9 Cir., 1940, 114 F.2d 108; In re Keystone Realty Holding Co., 3 Cir., 1941; 117 F.2d 1003; Dana v. Securities & Exchange Commission, 2 Cir., 1942, 125 F.2d 542; In re South State Street Bldg., Corp., 7 Cir., 1943, 140 F.2d 363; Horowitz v. Kaplan, 1 Cir., 1951, 193 F.2d 64."

The practical thrust of Petitioner's contention is that no secured creditor could appeal until after administrative costs were assessed against that creditor and the damage was done. In a liquidation case such as this with no assets or almost no assets available for distribution to unsecured creditors, it is highly improbable that they would appeal. Since the Trustee reported that there were

no stockholders equities to be dealt with (R.1261), stockholders of the debtor would not appeal.

4. We do not see how Title 28 U.S.C. 1292 applies to this appeal or what difference it makes. This statute was not argued by the Petitioner in any of his several briefs below, and was not considered by the court of appeals below, and is being raised in this Court for the first time.

5. While Petitioner and his attorney now claim they each worked some 300 hours more than the opinion below reflects, and that the hourly rate for the district court awards was not as high as computed in the opinion below, the error, if any, in this regard would be harmless. All that the opinion below does is to remand with directions to compute their respective fees at $25.00 and $50.00 per hour for the periods in question. The hours for the period in question are admittedly correct. Accordingly on remand the district court will apply the prescribed rates to the correct number of house involved. Moreover, Petitioner does not refer us to any portion of the record to support his computation of the hours involved.

6. On this excessive fee issue, the opinion below states:

> "[6-8] Our difference with the District Court is that we apply an additional factor: The public interest which is inherent in bankruptcy matters must be considered in awarding fees. The object is to draw a balance to the end that competent trustees and counsel are obtainable in matters of this kind because of the knowledge that they will be fairly compensated. They must

> not and cannot expect, however, to be overcompensated, for the court must exercise its discretion for the double purpose of fairly treating the trustee and his counsel while at the same time doing equity to the debtor and creditors ..." 405 F.2d 432-433

The legal principle followed by the court of appeals was laid down by this Court in the case of **In re Gilbert,** 276 U.S. 294 (1928) in which this Court admonished the lower federal courts that in awarding fees to officers of the court they should avoid "vicarious generosity." This Court has consistently held that Trustees in Bankruptcy are public officers who can be paid only under clear warrant of law. Further that "the desire to reduce the cost of reorganization [was] one of the controlling reasons for the enactment" of the bankruptcy statutes. **Callaghan** v. **Reconstruction Finance Corp.,** 297 U.S. 464, 469; **Realty Associates Securities Corp.** v. **O'Connor,** 295 U.S. 295, 299; **Dickinson Industrial Site, Inc.,** v. **Cowan,** 309 U.S. 382, 388; **Brown** v. **Gerdes,** 321 U.S. 178, 181-182.

There is no conflict between the circuits on the fee issue. Simply stated, the court of appeals below did not conduct a trial de novo in this case. As was noted by the court of appeals in the reorganization case of **London** v. **Snyder,** 163 F.2d 621 (8CCA 1947), the compensation allowed others in the same proceeding or in other reorganization cases affords little evidence of the reasonableness of the allowance in any particular case.

A reading of the cases cited by the Petitioner easily shows that there is no conflict with the Opinions in this case. **In Re 32-36 North State Street Building Corp.,** 164

F.2d 205 (7CCA 1947), the master eliminated one claim for fees, and substantially reduced three others, including a reduction of the Trustee from $12,000. to $10,000. in this reorganization case. The master, district court and court of appeals agreed that the services of counsel for appellants was for the benefit of their clients and not the estate. The court of appeals found no abuse of discretion.

In **Stein** v. **Hemker**, 157 F.2d 740 (8CCA 1946), the attorney for the debtor sought a fee of $12,000. and was awarded $2,000. The court of appeals found no abuse of discretion and emphasized the need for economical administration in a corporate reorganization. **In Re Coast Investors, Inc.**, 388 F.2d 622 (9CCA 1968), an attorney for a creditor committee sought $18,000. and appealed because he was allowed only $10,000. The court of appeals found no abuse of discretion because the attorney had duplicated in part the services of the Trustee and his attorney. **Levitt** v. **Robinson**, 402 F.2d 753 (9CCA 1968) was a Chapter 11 Proceeding in which the attorney received compensation of $2,794.28 prior to an arrangement petition. Afterwards the Referee in Bankruptcy allowed a fee of $750. and surcharged the attorney $1,903.78. The court of appeals found no error in the Referee's Findings of Fact (approved by the district court) nor mistake in applying the proper legal standard.

The last two cases cited by the Petitioner to show conflict in the circuits are not even remotely related to the legal standards applicable in determining reasonable compensation in a corporate reorganization case. **Lundgren** v. **Freeman**, 307 F.2d 104 (9CCA 1962) was a damage action involving a dispute between a contractor, a school district and architects. The district court found a mutual

mistake of fact and reformed the contract. The court of appeals held the judgment was not clearly erroneous. **Snider v. England,** 374 F.2d 717 (9CCA 1967) was an action in which the district court set aside a preference in bankruptcy and entered judgment against the appellant. The court of appeals held the judgment was not clearly erroneous.

7. Supreme Court Rule 23(4) provides:
"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

Petitioner has not stated the "Questions Presented" or the "Reasons For Granting The Writ" with the required "accuracy, brevity, and clearness." The Petitioner is simply seeking to have this Court re-examine the reasonableness of his compensation after it has been very carefully considered by six able judges of the Fifth Circuit Court of Appeals.

8. The opinions below are correct and do substantial justice between the parties. This Court has often admonished the federal courts to keep down the costs of judicial proceedings. The court of appeals below followed the policy of this Court by keeping a balance between "the public interest" and the need for just compensation for officers of the court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit should be denied.

Respectfully submitted,

CARL K. HOFFMANN
900 Dade Federal Savings Building
101 East Flagler Street
Miami, Florida 33131
Attorney for Respondent
MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief in Opposition to Petition For a Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit, was mailed to the attorney for the Petitioner, IRVING M. WOLFF, ESQ., 916 Biscayne Building, Miami, Florida 33130, this day of April, 1969.

CARL K. HOFFMANN